UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
PHYSICIANS RESOURCE GROUP, INC.	§	**Case No. 00-30748 RCM-11**
	§	
EYECORP, INC.	§	**Case No. 00-33410 RCM-11**
	§	
Debtors	§	**Jointly Administered Under**
	§	**Case No. 00-30748 RCM-11**

PHYSICIANS RESOURCE GROUP, INC., PRG TENNESSEE II, INC., PRG TENNESSEE IV, INC., and EYECORP,, INC., by the OVERSIGHT COMMITTEE Appointed Under the Modified First Amended Plan of Reorganization	§	
	§	
Plaintiffs/Counter Defendants	§	
	§	
v.	§	**Adversary No. 01-3515**
	§	**(Consolidated With)**
LUCIUS E. BURCH, III, and P.L.L.C., JOHN E. LINN, M.D., THOMAS A. BROWNING, M.D., ANDREW KRAUSS, M.D.	§	**Adversary No. 01-3585**
	§	
Defendants	§	
	§	
DAVID MEYER, VITREORETINAL FOUNDATION, and RME ASSOCIATES	§	
	§	
Defendants/Counter Plaintiffs	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary

In this adversary, the Court considered essentially three claims against, *inter alia*, the former Chairman of the Board of Debtor PRG and his affiliates – constructive fraudulent transfer, actual intent fraudulent transfer, and a note and guaranty claim. The Court also considered a breach of contract counterclaim by certain Defendants, only to the extent it can be setoff against any recovery by Plaintiffs. Trial was held in the matter from January 24, 2003 through February 10, 2003. The parties offered live and deposition testimony of many witnesses, and, collectively, in excess of one thousand exhibits. After full consideration of the record, the Court finds that constructive fraud succeeds on a relatively small transfer by PRG, but fails as to EyeCorp, Inc. because Plaintiffs failed to prove by a preponderance of the evidence that EyeCorp was insolvent on the date of the transfers. As to actual intent fraudulent transfer, the Court holds that only the transfer of the land and building is avoidable. Finally, the Court enters judgment on the note and guaranty in question. Following are the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

A. FINDINGS OF FACT

Jurisdiction

1. This Court has jurisdiction over this matter under 11 U.S.C. §§ 105, 544, and 548, and 28 U.S.C. § 1334 and section 11.1 of Debtors' Modified First Amended Joint Liquidating Plan Under Chapter 11 (the "Liquidating Plan"). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(H), (O). (Stipulated Fact ("SF") 1.)

Venue

2. Venue of this proceeding is proper in this district under 28 U.S.C. §§ 1408 and 1409. (SF 2.)

Parties and Standing

3. Physicians Resource Group, Inc. ("PRG") is a publicly held Delaware corporation. (SF 3.)

4. EyeCorp, Inc. ("EyeCorp") is a wholly-owned subsidiary of PRG. (SF 4.)

5. The Liquidating Plan contemplated the formation of the Oversight Committee, which brings this suit. (Liquidating Plan, Pls.' Ex. 371.)

6. Plaintiffs have standing and capacity to bring this suit. (Liquidating Plan § 9.5.5, Pls.' Ex. 371; *see also* Authorization to Pursue Claims dated July 28, 2001, Pls.' Ex. 458; Authorization to Pursue Claims dated August 31, 2001, Pls.' Ex. 459.)

7. The First Amended Disclosure Statement Accompanying First Amended Joint Liquidating Plan under Chapter 11 ("Disclosure Statement") provides that "[u]nder the Plan, all causes of action to recover preferences and fraudulent conveyances rest with the Liquidation Agent who is charged with investigating the merits of any such causes of action and, if desirable, prosecuting the same." (*See* Disclosure Statement at sec. V.H, Pls.' Ex. 465.)

8. The Liquidating Plan gives the Liquidation Agent the power to "prosecute such objections and defend Claims and counterclaims asserted in connection therewith" and "to prosecute Causes of Action." (Liquidating Plan § 9.1.5, Pls.' Ex. 371.)

9. The Liquidating Plan gives the Oversight Committee the right to pursue any claims or causes of action against PRG's and EyeCorp's former officers and directors. (Liquidating Plan § 9.5.5, Pls.' Ex. 371.)

10. The Liquidating Plan vests the Oversight Committee with the right to pursue any causes of action under chapter 5 of the Bankruptcy Code that the Liquidation Agent chooses not

to pursue. (Liquidating Plan § 9.5.5, Pls.' Ex. 371.)

11. The Liquidation Agent has "authorize[d], consent[ed] to, and appoint[ed] the Oversight Committee to pursue any and all claims that the debtors may have, whether known or unknown, against Dr. David Meyer . . . Vitreoretinal Foundation, P.L.L.C., or RME Associates, Inc." and "John E. Linn, M.D., Thomas A. Browning, M.D., and Andrew Krauss, M.D." (Authorization to Pursue Claims dated July 28, 2001, Pls.' Ex. 458; Authorization to Pursue Claims dated August 31, 2001, Pls.' Ex. 459.)

12. The Liquidation Agent has the obligation to liquidate all of the subsidiaries of PRG, including the subsidiaries' claims against third parties, for the benefit of their parent. (Liquidating Agency Agreement § 1.01, Pls.' Ex. 464.)

13. Dr. David Meyer ("Meyer") is an ophthalmologist who resides in Tennessee. (Meyer 2/4/03 Test. at 89-91; SF 5.)

14. Meyer was Chairman of the Board of Directors of EyeCorp from February 1994 to March 18, 1996. For PRG, he served as a director from March 18, 1996 to January 24, 1998 and as Chairman of the Board from October 30, 1998 to March 16, 2000. (EyeCorp/PRG Joint Proxy Statement, Pls.' Ex. 777; Merger Agreement, Pls.' Ex. 310; Disclosure Statement at sec. III.F, Pls.' Ex. 465; PRG 10-K for 2000, Pls.' Ex. 351 at 37.)

15. Vitreoretinal Foundation, P.L.L.C. ("VRF") is a Tennessee professional limited liability company. VRF consists of the eye care practice of Meyer and affiliated physicians. (SF 6.)

16. Defendant RME Associates ("RME") is a Tennessee general partnership. Meyer has at all relevant times been a general partner of defendant RME, and defendant RME has

at all relevant times been primarily owned by him. Defendant RME now owns the real estate located at 825 Ridge Lake Blvd. in Memphis, Tennessee ("Land and Building"), which is, in part, the subject of this adversary proceeding. (SF 7.)

17. The general partners of defendant RME are Meyer and his wife. (SF 8.)

18. Defendants Drs. John E. Linn, M.D. ("Linn"), Thomas A. Browning ("Browning"), and Andrew Krauss ("Krauss") are individual Tennessee residents. (SF's 9-11.)

19. Meyer, Linn, Browning and Krauss are physician partners in VRF. (Meyer 2/4/03 Test. at 148; 2/23/94 Service Agreement between EyeCorp and VRF at 22-23, Pls.' Ex. 51.)

Formation of PRG and EyeCorp

20. PRG was originally formed in 1993 to operate as a physician practice management company whereby it was to perform non-medical management services for ophthalmic and optometric practices and for ambulatory surgery centers ("ASCs") associated with certain ophthalmic practices in exchange for the payment of certain fees. (SF 12; PRG Registration Statement (S-1/A), Pls.' Ex. 57.)

21. Generally, PRG purchased the assets used in the operation of eye-care practices and then entered into long-term service agreements with the practices. Under the terms of the service agreements, PRG provided non-medical management services and allowed the practices to use the medical equipment PRG had acquired. In turn, the practices were required to pay PRG a management fee. PRG also purchased interests in and managed ambulatory surgery centers affiliated with the practices and in return received an equity ownership percentage of the ASCs' profits. (Disclosure Statement at sec. III.A, Pls.' Ex. 465.)

22. EyeCorp was formed by Meyer in or about February 1994 to operate as a

physician practice management company to perform non-medical management services for ophthalmologist and optometrist practices and for ambulatory surgery centers associated with certain ophthalmic practices in exchange for the payment of certain fees. (SF 13.)

23. Meyer was EyeCorp's Chairman of the Board and its largest shareholder prior to its merger with PRG. (PRG Registration Statement (S-1/A), Pls.' Ex. 57; Amended and Restated Agreement and Plan of Merger, Pls.' Ex. 310.)

24. Meyer formed EyeCorp in February 1994 by contributing the assets of VRF, the associated ambulatory surgery center (commonly known as the Ridge Lake ASC or RLASC) and the Land and Building, in which the VRF practice and RLASC are located. Prior to EyeCorp's formation, the building, and the land on which it is located, had been held by old RME, which was a partnership involving Meyer and Rudolph. (RME Asset Exchange Agreement, Pls.' Ex. 747; Asset Exchange Agreement, Pls.' Ex. 748; Meyer d/b/a RLASC Asset Exchange Agreement, Pls.' Ex. 749.)

25. On or about February 23, 1994, VRF, Linn, Browning, Meyer and other VRF physicians entered into a management services agreement ("MSA") with EyeCorp (the "VRF Service Agreement" or the "VRF MSA") under which EyeCorp was to receive management fees for providing certain management services to VRF. (SF 15; VRF Service Agreement, Pls.' Ex. 51; Meyer 2/4/03 Test. at 117.)

26. In turn, EyeCorp paid total consideration of approximately $10 million for the practice assets of VRF, of which Meyer owned 35%. The consideration paid by EyeCorp consisted of EyeCorp stock valued at approximately $5 million and approximately $5 million in cash. (Rudolph 1/24/03 Test. at 187-88.)

27. At the time the VRF Service Agreement was entered into, Meyer was both a partner in VRF and the largest shareholder and Chairman of the Board of EyeCorp. (VRF Service Agreement, Pls.' Ex. 51.)

The Land and Building at 825 Ridge Lake

28. In March 1996, EyeCorp was merged with PRG Acquisition Corporation, a subsidiary of PRG. As a result of the merger, EyeCorp became a wholly-owned subsidiary of PRG, but remained a separate corporation. (*See* SF 17; Meyer 2/4/03 Test. at 99; Amended & Restated Agreement and Plan of Merger, Pls.' Ex. 310; Disclosure Statement at sec. III.B.1, Pls.' Ex. 465.)

29. The merger between EyeCorp and PRG was accounted for as a pooling of interests transaction. (Churchey 1/30/03 Test. at 146-47; Innes 1/27/03 Test. at 75; PRG Registration Statement (S-1/A), Pls.' Ex. 57; Amended & Restated Agreement and Plan of Merger, Pls.' Ex. 310.)

30. The Land and Building, which had been an asset of EyeCorp since its formation in 1994, remained an asset of EyeCorp after the merger.

31. Meyer testified that he understood that the Land and Building would be transferred back to him at some undetermined date after the merger. (Meyer 2/4/03 Test.) Meyer offered no documents to this effect. The filings with the SEC, offered into evidence, do not indicate this obligation to transfer. *(See, e.g.,* 1996-2001 PRG SEC filings, Pls.' Exs. 387-393.) Meyer's testimony on this point was not supported by the other evidence offered at trial. In fact, several witnesses close to the merger transaction testified that PRG did not agree to transfer the Land and Building back to Meyer at some time in the future for little or no consideration. (*See, e.g.,* Painter 1/30/03 Test. at 140; Charles 1/30/03 Test. at 134; Churchey 1/30/03 Test. at 146-47.) Meyer's

testimony on this issue is not persuasive.

32. After the merger on March 18, 1996, Meyer became PRG's largest shareholder. (Meyer 2/4/03 Test. at 174; Nicolaou 1/29/03 Test. at 225; PRG Schedule 13-D, Pls.' Ex. 393.)

33. Meyer continuously remained PRG's largest shareholder. (*See, e.g.*, Nicolaou 1/29/03 Test. at 225.)

PRG's Financial Condition

34. During 1998, PRG experienced financial difficulties. Its stock price was declining rapidly. (Moore 2/10/03 Test. at 170; Horn 2/5/03 Test. at 181-82.)

35. PRG's CEO resigned in November 1997. The Board agreed that Meyer would oversee day-to-day management of the company on behalf of the Board while Meyer searched for a new CEO. (PRG 11/16/97 Board Minutes, Pls.' Ex. 712; PRG Disclosure Statement at sec. III.F, Pls.' Ex. 465.)

36. Meyer was PRG's interim chairman from about November 16, 1997 until January 24, 1998. (PRG 11/16/97 Board Minutes, Pls.' Ex. 712; PRG 12/03/97 Board Minutes, Pls.' Ex. 713; PRG 12/10/97 Board Minutes at Pls.' Ex. 714.)

37. In late 1997, PRG took substantial write-offs in connection with the sale, disposition or disassociation of several of its eye care practices. (PRG Disclosure Statement at sec. III.C, Pls.' Ex. 465.)

38. PRG's stock price peaked at $34.375 in the third quarter of 1996, fell to $11.56 in the third quarter of 1997, and further fell to $4.75 in the first quarter of 1998. (PRG Disclosure Statement at sec. III.D, Pls.' Ex. 465; PRG stock prices for 1996-1998, Pls.' Ex. 25.)

39. During this time, many providers stopped reporting financial information to PRG and EyeCorp and also began withholding payment of management fees and ASC profits owed to PRG and EyeCorp. Some providers served notices of default and termination and filed lawsuits alleging breaches of their service agreements. (Innes report at Ex. 6., Pls.' Ex. 283; PRG Disclosure Statement at sec. III.D, Pls.' Ex. 465; Yeary 1/3/03 Dep. Test. at 31-32, Defs.' Ex. 1016; Moore 2/10/03 Test., at 178.)

40. Management fees paid by the practices were a principal source of revenues for PRG. (Innes report at Ex. 6, Pls.' Ex. 283; PRG 10-K for 1997 at 12, Pls.' Ex. 349.)

41. On April 13, 1998, Arthur Andersen issued a "material weakness" letter to PRG, which highlighted accounting and internal controls problems at PRG. (Arthur Andersen "material weakness" letter, Pls.' Ex. 516.)

42. By October 1998, many practices were reserving their management fees and ASC income. At that time, PRG had little cash. PRG's President and CEO instructed PRG's accounting department to pay only payroll, rent, utilities and certain professional fees. (10/12/98 letter from P. Dorflinger, Pls.' Ex. 306.4.)

43. On November 13, 1998, Arthur Andersen sent PRG a letter confirming its resignation as PRG's auditor. (Letter from Arthur Andersen, Pls.' Ex. 661; Yeary 2/6/03 Test. at 94-95.)

44. Because of the nonpayment of management fees, notices of default, notices of termination and lawsuits filed by the providers, PRG was in gridlock by the end of 1998. (*See* 11/18/98 Interim Operating Agreement, Pls.' Ex. 618.)

45. Due to PRG's weakening financial condition, the New York Stock Exchange delisted PRG's stock in late 1998. (PRG 10-K for 1998, Pls.' Ex. 390.)

Transfer of Guaranty Fees to Meyer by PRG

46. PRG had a $90 million revolving credit loan agreement at NationsBank in 1997. (SF 20.)

47. That revolving credit loan agreement went into default in November 1997. (Innes 1/27/03 Test. at 134-35; Burch 2/3/03 Test. at 99-101; SF 21.)

48. The revolving credit loan agreement was amended in a $20 million First Amended and Restated Loan Agreement in November 1997. (SF 22; Horn 2/5/03 Test. at 156.)

49. At that time, Meyer personally guaranteed $8,000,000 (plus any unpaid interest) of the amended credit loan agreement between PRG and NationsBank. (11/28/1997 Unconditional Limited Guaranty, Pls.' Ex. 636.) The guaranty benefitted PRG, and indirectly, EyeCorp, because it kept the loan from being called.

50. When Meyer originally guaranteed the NationsBank credit facility in November 1997, there was no agreement or commitment to pay any fees to Meyer in exchange for his guaranty. (Rudolph 1/24/03 Test. at 209-10; Innes 1/27/03 Test. at 136; Shimoff 2/3/03 Test. at 188, 194-95.)

51. However, the payment of guaranty fees to Meyer was considered and approved by the PRG Board on January 24, 1998. (SF 28; PRG 1/24/98 Board Minutes, Pls.' Ex. 715.)

52. The guaranty fees were later claimed as credits or offsets against amounts due on Meyer's and/or VRF's practice accounts with, and Ridge Lake ASC profits due to, EyeCorp.

(Innes 1/27/03 Test. at 136; Burch 2/3/03 Test. at 107; Nicolaou 2/5/03 Test. at 108.) Similar fees were paid to Lucius Burch and to Robert Alpert, other PRG Board members who guaranteed the NationsBank loan.

53. Meyer and VRF received credits or offsets, totaling $270,000, to amounts owed to EyeCorp for the period November 1997 through April 1998. (Innes 1/27/03 Test. at 135; PRG Schedule 14A, Pls.' Ex. 389.1.)

54. NationsBank required the guaranty, but never required Meyer to pay any amounts due under his guaranty, even when PRG defaulted on the loan. (Innes 1/28/03 Test. at 46.)

55. The amended NationsBank loan agreement was subsequently amended and restated in April 1998. Plaintiffs do not challenge any guaranty fees paid or treated as credit for periods after April 1998. (SF 23.)

56. Resurgence Asset Management, LLC ("Resurgence"), on behalf of its affiliated funds, began purchasing PRG bonds in December 1997 and is currently PRG's largest bondholder. (SF 19.) Resurgence has therefore been a creditor of PRG since December 1997.

Meyer's LOI

57. On or about July 25, 1998, Meyer submitted a letter of intent ("LOI") to PRG, and PRG agreed to its terms. (SF 29; LOI, Pls. Ex. 86; PRG Disclosure Statement at sec. III.E, Pls.' Ex. 465; PRG 7/31/98 Annual Meeting Minutes, Pls.' Ex. 703.)

58. Meyer set forth in the LOI his intention to restructure PRG. (PRG Board Minutes - 6/3/98 (noting that R. Gilleland "advised the Board that David Meyer, M.D. had disclosed to him that he was leading an effort to organize certain physicians affiliated with the Company to develop their interest in purchasing the Company."), Pls.' Ex. 699; LOI, Pls.' Ex. 86.)

59. The LOI contained a relatively typical lockup provision which prohibited PRG from soliciting other offers during the period in which it remained in effect. The LOI also contained a relatively typical provision which prohibited PRG from entertaining any other offers without suffering severe financial penalties. (*See* LOI, Pls.' Ex. 86; PRG Disclosure Statement at sec. III.E, Pls.' Ex. 465.)

60. Meyer's proposed tender offer contemplated the buyback by providers of their practices (the primary assets of PRG and its affiliates). (LOI, Pls.' Ex. 86; Meyer's proposed tender offer, Pls.' Ex. 800.)

61. Meyer's proposed tender offer was similar to PRG's proposed restructuring plan in March 1998. (Barbee 2/4/03 Test. at 58-59; Meyer's proposed tender offer, Pls.' Ex. 800.) (Burch 1/24/03 Test. at 269-70; Haney 1/30/03 Test. at 18-19.)

62. Following several extensions of the deadline for effectuating the tender offer, the PRG Board announced on October 26, 1998 that the LOI and tender offer by Meyer were terminated. (Haney 1/30/03 Test. at 20-21; Ryan 2/3/03 Test. at 24; Burch 2/3/03 Test. at 110, 130-31, 133-34; Barbee 2/4/03 Test. at 51-52; PRG Disclosure Statement at sec. III.E, Pls.' Ex. 465; PRG 10/26/98 Board Minutes, Pls.' Ex. 708.)

Transfers of LOI Expenses

63. In late 1998 and in 1999, EyeCorp paid expenses that Meyer personally incurred in connection with his LOI. (Nicolaou 1/29/03 Test. at 226-28; Yeary 2/6/03 Test. at 67; PRG 11/11/99 Board Minutes, Pls.' Ex. 403.)

64. At a PRG Board meeting on November 11, 1999, while Meyer was Chairman of PRG's Board, the Board considered and ratified the reimbursement of Meyer's expenses

associated with the LOI. Meyer abstained from that vote. A list of the expenses in question was attached to the minutes. (Yeary 2/6/03 Test. at 68-69; PRG 11/11/99 Board Minutes, Pls.' Ex. 403.)

65. Most of the LOI expenses that the Board voted to ratify had already been paid directly from EyeCorp's bank accounts to Meyer's counsel and others. (Nicolaou 1/29/03 Test. at 226-29; Yeary 2/6/03 Test. at 67-68.)

66. PRG and EyeCorp paid a total of $549,617 for expenses incurred by Meyer in connection with the unsuccessful tender offer. PRG paid $96,172 of this amount, while EyeCorp paid $453,445. (Innes 1/27/03 Test. at 131-33; PRG 11/11/99 Board Minutes, Pls.' Ex. 403; Innes Expert Report, Pls.' Ex. 283.)

Meyer, as Chairman

67. On October 30, 1998, Meyer took over as Chairman of the PRG Board, a position he held until after PRG filed for bankruptcy. (SF 31; Meyer 2/4/03 Test. at 131.)

68. The PRG Board from late 1998 until January 31, 2000 consisted of three physicians (Meyer, Shepherd and Dulaney) and Burch. (PRG Disclosure Statement at Sec. III.F, Pls.' Ex. 465.)

Performance of the VRF Service Agreement

69. PRG/EyeCorp provided VRF with services in 1997 and 1998 related to marketing, recruiting, human resources, sales, coding, training, billing and collection, front desk services, scheduling, accounting, managed care, training, benefits, medical malpractice coverage provisioning, purchasing, administration, budgeting and planning. (M. Yeary 1/3/03 Dep. Test., Defs.' Ex. 1016 at 83-85.)

70. PRG/EyeCorp provided VRF with services in 1999 related to marketing,

recruiting, human resources, sales, coding and training, billing and collection. (M. Yeary Dep. Test., Defs.' Ex. 1016 at 80-82.)

71. PRG/EyeCorp provided substantial services to VRF in 1997 and 1998. The on-site administrator in Memphis, Steve Rudolph, was paid by PRG, so his services to VRF were services provided by PRG/EyeCorp. EyeCorp also provided VRF budgeting services and consulting advice, reviewed strategic business plans, monitored financial performance, evaluated purchasing and insurance, and advised on roll-in acquisitions. (Chambers 2/10/03 Test. at 120-22.)

72. PRG/EyeCorp provided substantial technical support to the VRF in 1997 and 1998. They maintained a technical support desk that was available 24 hours a day, 7 days a week that VRF used significantly. PRG/EyeCorp also sent several technicians to the VRF in Memphis to troubleshoot and resolve wiring and conductivity issues. Mark Johnson of PRG arranged for the president of the software management company that the VRF used to meet with him and VRF to resolve software issues. In providing services to VRF, Johnson endeavored to provide "over-the-top" service because Meyer was a major shareholder. PRG/EyeCorp provided more technical services to VRF than to any other single practice. Meyer never expressed any dissatisfaction to Johnson regarding the services provided. (Johnson 2/10/03 Test. at 127-29, 140-41.)

73. PRG/EyeCorp provided substantial accounting services to VRF in 1998 and 1999. They provided full-time accounting personnel who worked at VRF and RLASC in Memphis who were paid by PRG, including Steve Rudolph and Rose Delgado. The services provided to VRF by these PRG employees included monthly financial statements, patient billings, cash receipts and reconciliations. (Nicolaou 2/10/03 Test. at 153-54.)

74. As of October 1998, VRF was delinquent on its payment of management fees

under the VRF Service Agreement in excess of $500,000. (Nicolaou 1/29/03 Test. at 225-226; Nicolaou 2/5/03 Test. at 91-92.)

75. Defendants pled a theory of damages based on lost profits. (Defs.' Second Am. Answer and Countercls. ¶ 25; Defs.' 12/9/02 Am. Resp. to EyeCorp's Interrog. No. 7.)

76. At trial, Defendants asserted that the management fees paid by VRF to EyeCorp were the damages sought for their breach of contract claim. (Defs.' 2/10/03 argument on directed verdict at 90.)

77. Neither Meyer nor the VRF ever sent a written notice of default relating to the VRF management service agreement with EyeCorp. Nor did they ever file suit against EyeCorp for breach of that agreement, prior to its counterclaim in this adversary. (Nicolaou 1/29/03 Test. at 261; Meyer 2/4/03 Test. at 132-33.) Under the VRF Termination Agreement, PRG/EyeCorp on the one side, and VRF on the other, entered into mutual releases. That transaction is not set aside between PRG/EyeCorp and VRF. Therefore, the mutual release as to those parties is effective and precludes any claim by VRF in these proceedings against PRG and EyeCorp.

Houlihan Lokey Methodology

78. In December 1998, the PRG Board retained Houlihan, Lokey, Howard & Zukin ("Houlihan Lokey"), a nationally known and reputable financial advisory firm, to assist PRG in developing a formula for use in connection with providers' repurchases of assets of eye care practices and interests in ASCs owned by PRG and its subsidiaries, including EyeCorp. (Houlihan Lokey Engagement Letter, Pls.' Ex. 368.1; Margulis 1/28/03 Test. at 179-81, 188-189; PRG Disclosure Statement at sec. III.G, Pls.' Ex. 465; SF 32.)

79. The Asset Sale Methodology Plan ("Houlihan Lokey Formula") developed

by Houlihan Lokey was approved by the PRG board on July 11, 1999. (SF 33; PRG 7/11/99 Board Minutes with PRG Asset Sale Methodology attached as Exhibit A, Pls.' Ex. 739.)

80. The Houlihan Lokey Formula was to be used for sales by PRG and its subsidiaries of practice assets and ASCs back to provider physicians. It contemplated the disposition of the major assets of PRG and its subsidiaries. (Margulis 1/28/03 Test. at 179-181; PRG 7/11/99 Board Minutes with the Houlihan Lokey Formula attached as Exhibit A, Pls.' Ex. 739.) Therefore, the Houlihan Lokey Formula and its use were not secret. The formula was disclosed and made public. Physicians and the bondholders were aware of the Houlihan Lokey Formula and its use.

81. The PRG Board proceeded to sell a large portion of the assets of the company and its subsidiaries, including EyeCorp, back to providers, under the Houlihan Lokey Formula. (Margulis 1/28/03 Test. at 230-31.) From the testimony offered, these sales and the use of the Houlihan Lokey Formula appear to have been made public.

82. Prior to January 31, 2000 and the VRF transfers, more than 50 practices had been repurchased by providers associated with PRG and its subsidiaries. (Nicolaou 1/29/03 Test. at 233.) Such transactions were known to the parties in interest, including the bondholders.

83. The Houlihan Lokey Formula was not applicable to, and in fact was unuseable as to, real estate. (Innes 1/27/03 Test. at 147-148; Margulis 1/28/03 Test. at 266; Haney 1/30/03 Test. at 124.)

84. After the instant bankruptcy case was filed, Judge McGuire found the formula to be fair. (2/14/00 Tr., Pls.' Ex. 658.) The Houlihan Lokey Formula was used during the course of the underlying bankruptcy case.

Termination Transfers

85. At issue in the adversary is a transaction, the VRF Termination Agreement. Although the VRF Termination Agreement was not closed until January 31, 2000, its essential terms had been set for months and were the result of a lengthy period of negotiation. Discussions with Dr. Meyer about the termination began as early as the summer of 1999. (9/26/99 Letter to Meyer regarding terms of VRF buyback, Defs.' Ex. 200.)

86. In negotiating the VRF Termination Agreement, Meyer acted on his own behalf individually as well as on behalf of VRF and PRG. (Ryan 2/3/03 Test. at 65-66.)

87. Although the VRF assets were held by EyeCorp, PRG's Board approved the terms of the VRF Termination Agreement at a meeting on December 16, 1999. (PRG 12/16/99 Board Minutes, Pls.' Ex. 192.)

88. On or about January 31, 2000, Meyer executed signature pages to the Termination Agreement individually and on behalf of VRF and RME. (Meyer 2/4/03 Test. at 142; Termination Agreement, Pls.' Ex. 210; Fax from Rudolph to Taten attaching signed signature pages, Pls.' Ex. 226; Termination Agreement - Brant's copy, Pls.' Ex. 311 at tab 1.)

89. Linn, Browning and Krauss executed a signature page to the Termination Agreement on or about January 31, 2000. (Termination Agreement, Pls.' Ex. 210; Fax from Rudolph to Taten attaching signed signature pages, Pls.' Ex. 226; Termination Agreement - Brant's copy, Pls.' Ex. 311.).

The Land and Building at 825 Ridge Lake Boulevard

90. Meyer made it clear that he would not buy back his VRF practice assets unless he also received back the Land and Building. (Margulis 1/28/03 Test., at 244.)

91. The Land and Building were transferred by EyeCorp to RME via a warranty deed dated January 31, 2000, and filed of record on February 2, 2000. (SF 37; Warranty Deed, Pls.' Ex. 219; Termination Agreement - Brant's copy, Pls.' Ex. 311 at tab 35.)

92. VRF paid $290,255 to PRG/EyeCorp for the Land and Building. (Innes 1/27/03 Test. at 145; PRG 12/16/99 Board Minutes, Pls.' Ex. 192.)

93. The $290,255 purchase price for the Land and Building was provided to Houlihan Lokey by Rudolph, who was acting on Meyer's behalf. (Margulis 1/28/03 Test. at 245-46, 264.)

94. The market value of the land and building was $4.65 million as of January 31, 2000. (SF 36.)

95. On or about January 31, 2000, Meyer executed an Affidavit of Value and swore that the greater of the actual consideration for the transfer of the Land and Building, or its value, was $400,292. (Meyer 1/24/03 Test. at 160-61; Termination Agreement - Brant's copy, Pls.' Ex. 311 at tab 35.)

96. The affidavit by Meyer in the Affidavit of Value dated January 31, 2000 was false. (Meyer 1/24/03 Test. at 150.)

97. On February 1, 2000, RME, through Meyer, mortgaged the Land and Building for $2.5 million. (FTB Loan Documents, Pls.' Ex. 376.) This action supports a finding that Dr. Meyer knowingly received the Land and Building for much less than the fair market value of the property. The gross disparity between the price and the value tends to show a lack of good faith on the part of the transferee.

98. Meyer told Houlihan Lokey that PRG had agreed in 1996 to give the Land and

Building to him for little or no consideration at some time in the future. (Margulis 1/28/03 Test. at 186-87, 205-06.) After reviewing the exhibits offered and the testimony of the witnesses on this issue, the position of Dr. Meyer on this point does not appear to be credible.

99. The evidence at trial did not establish that there was such an agreement. (*See, e.g.*, Charles (EyeCorp's President and CEO at the time of merger) 1/30/03 Test. at 134; Painter (EyeCorp's counsel at the time of merger) 1/30/03 Test. at 140; Churchey (EyeCorp's accountant at the time of merger) 1/30/03 Test. at 146-47.) These witnesses were present at the time of the merger. They did not support Meyer's assertion that PRG/EyeCorp promised to reconvey the Land and Building for little or no consideration. The testimony by Messrs. Charles, Painter, and Churchey on this issue is credible.

100. At trial, Meyer did not testify regarding the transfer of the Land and Building and did not explain the substantial difference between the stipulated market value of the real estate at $4.65 million and his $290,225 purchase price.

101. Houlihan Lokey asked for an appraisal of the Land and Building, but never received it. (Margulis 1/28/03 Test. at 246-48; Houlihan Lokey Initial Information Checklist, Pls.' Ex. 182.)

102. Representatives of PRG's management were unable to confirm or deny Meyer's claim about the land and building. (Margulis 1/28/03 Test. at 203-08, 221, 259-61; Ryan 2/3/03 Test. at 223-24, 240-41; Yeary 1/3/03 Dep. Test., Defs.' Ex. 1015 at 132-33.)

103. PRG and/or EyeCorp received substantially less than reasonably equivalent value for the transfer of the Land and Building to RME. (Innes 1/27/03 Test. at 167, 170.)

104. Resurgence, the major creditor of PRG, did not learn that the Land and

Building were transferred to Meyer until after PRG filed for bankruptcy. (Haney 1/30/03 Test. at 35.)

The VRF Practice Assets

105. The Houlihan Lokey Formula was not applied correctly to the sale of the VRF practice assets, which may have resulted in some understatement of the purchase price. (Innes 1/27/03 Test. at 150-152; Haney 1/30/03 Test. at 125.)

106. The Houlihan Lokey Formula for determining the purchase price of practice assets was based on 1997 management fees. (Houlihan Lokey 7/27/99 letter, Pls.' Ex. 380.)

107. VRF nevertheless proposed using $1,282,183 as the number for the 1997 management fees. (Fax from Rudolph to Yeary, Defs'. Ex. 417.)

108. PRG agreed to use VRF's $1,282,183 number to determine the VRF purchase price, although the records were not precise on the amount of management fees actually owed. (Nicolaou 1/27/03 Test. at 233-34; Innes 1/27/03 Test. at 151-52.)

109. EyeCorp may have received somewhat less than it should have under the Houlihan Lokey Formula for the transfer of the VRF practice assets. However, the correct amount appears to be subject to a bona fide calculation dispute, to which PRG agreed. The difference between the two amounts is not, in a relative sense, great. (Innes 1/27/03 Test. at 170-71.)

The 35% Interest in the Ridge Lake ASC

110. In connection with the termination transfers, RME paid approximately $562,423 in cash for the 35% interest in the Ridge Lake ASC. (PRG 12/16/99 Board Minutes, Pls.' Ex. 192; Termination Agreement at Ex. 3, Pls.' Ex. 210.) The Oversight Committee now claims the right number for such assets is $724,250.

111. The Houlihan Lokey Formula called for the purchase price of the 35% interest in the Ridge Lake ASC to be 35% of 1998 EBITDA. (Innes 1/27/03 Test. at 146-47; Hakala 2/7/03 Test. at 162.)

112. The Houlihan Lokey Formula may not have been correctly applied to the sale of the 35% interest in the Ridge Lake ASC, which resulted in somewhat of an understatement of the purchase price. (Innes 1/27/03 Test. at 150-51.)

113. EyeCorp may not have received full value for the transfer of the 35% interest in the Ridge Lake ASC. However, the correct amount appears to be subject to a bona fide calculation dispute, to which the PRG agreed. In a relative sense and in actual dollars, the difference between the two amounts is not great.

The Promissory Note and Guaranty

114. As part of Meyer's termination transfers, VRF executed a promissory note (the "Note") promising to pay to EyeCorp the sum of $1,282,183 with interest at the rate of 10% per annum. (Promissory Note, Pls.' Ex. 212.) This amount represents the sale price of the VRF assets.

115. Meyer signed the Note on behalf of VRF. (Promissory Note, Pls.' Ex. 212; Termination Agreement - Brant's copy, Pls.' Ex. 311 at tab 12.)

116. Meyer, Linn, Browning and Krauss each personally guaranteed the Note in writing (the "Guaranty"). (Guaranty Agreement, Pls.' Ex. 453; Termination Agreement - Brant's copy, Pls.' Ex. 311 at tab 15; PRG Disclosure Statement at sec. III.I, Pls.' Ex. 465.)

117. There have been no payments of principal or interest on the Note or Guaranty. (Nicolaou 1/29/03 Test. at 237-239; Disclosure Statement at sec. III.I, Pls.' Ex. 465.)

118. The total amount due on the Note, including interest accrued through

January 31, 2003, is $1,657,000 ($1,282,183 principal and $374,817 interest at 10%). (Innes 1/27/03 Test. at 160-161; Promissory Note, Pls.' Ex. 212.)

119. Under the terms of the Guaranty, Meyer and the other guarantors are jointly and severally liable for the Note and have waived all of their rights under applicable suretyship laws. (Guaranty Agreement, Pls.' Ex. 453; Termination Agreement - Brant's copy, Pls.' Ex. 311 at tab 15.)

120. Proper demand for payment under the Note and the Guaranty has been made to VRF, Meyer, Linn, Browning and Krauss. (Nicolaou 1/29/03 Test. at 238-39; Demand letters, Pls.' Exs. 241-42, 246-48, 250-51, 253, 794-95; PRG Disclosure Statement at sec. III.I, Pls.' Ex. 465.)

121. At the time he signed the Note, Meyer knew he was signing a promissory note and understood that he would be obligated to pay the Note. (Meyer 2/5/03 Test. at 30.)

122. Meyer was aware of the terms of the Note and understood the terms. (Meyer 2/5/03 Test. at 24.)

123. On January 20, 2000, Meyer voted to approve the minutes of the December 16, 1999 meeting of PRG's Board of Directors where the PRG Board had approved the terms of Meyer's termination transfers that included, among other things, the Note. (PRG 12/16/99 Board Minutes, Pls.' Ex. 192; Redacted PRG 1/20/00 Board Minutes, Pls.' Ex. 202R.)

124. Meyer asserts that the signatures appended to the Note and Guaranty were to be held in "escrow" pending the satisfaction of certain conditions to the signatures' release. However, on the evening of the closing of the Termination Agreement, Meyer assured counsel for PRG and EyeCorp that the original Note would be forthcoming via overnight delivery immediately after the transaction closed. But six weeks after the transaction closed, Mike Taten, counsel for

PRG/EyeCorp., had received neither the Note nor any original signature pages. (4/11/00 Taten letter, Pls.' Ex. 492.)

125. Meyer's testimony concerning the conditions to be satisfied before the signature pages for his termination transfers could be released was not persuasive in light of the documents offered into evidence. (*See* Meyer 1/24/03 Test. at 155-56; Meyer 2/4/03 Test. at 151-156.) This Court finds that the conditions testified about by Dr. Meyer did not exist or, in the alternative, were satisfied and/or waived.

126. The alleged conditions were not in writing. (Meyer 2/5/03 Test. at 9-11.)

127. The Court finds that no conditions to closing the transaction exist other than those listed in the Termination Agreement. (*See* Brant (Meyer's counsel) 1/24/03 Test. at 248-250; Yeary 1/3/03 Dep. Test. at 116 (representatives of neither PRG nor EyeCorp stated to Meyer on January 30, 2000 that the signature pages that were a part of the Termination Transaction would be held in escrow pending completion of certain conditions), at 117 (the Termination Transaction was not conditioned on the review and approval of the documents by counsel for VRF), at 117-18 (the effectiveness of the Note and the Guaranty signed in connection with the Termination Transaction was not conditioned on Resurgence's purchase of the physician provider's stock in PRG), at 118 (the effectiveness of the Note and the Guaranty signed in connection with the Termination Transaction was not conditioned on final resolution of whether or not VRF was obligated to pay a sixth year of management fees), Defs.' Ex. 1015; Termination Agreement - Brant's copy, at Tab 1 § 9.1, Pls.' Ex. 311.)

128. As of January 31, 2000, all of the conditions listed in the Termination Agreement had been met with the exception of PRG's receipt of a fairness opinion. (Brant (Meyer's

counsel) 1/24/03 Test. at 252-54.)

129. VRF, Ridge Lake ASC, and Van Dyck ASC wire transferred money for some of the termination transfers directly into PRG/EyeCorp bank accounts. (Nicolaou 1/29/03 Test. at 236-37; Fax re: wire transfer to PRG, Pls.' Ex. 532.)

130. The Termination Transaction closed. (Burch 1/24/03 Test. at 265-66; Nicolaou 1/29/03 Test. at 237; Nicolaou 2/5/03 Test. at 64.)

131. Meyer represented to the PRG Board of Directors that the Termination Transaction closed. (Burch 1/24/03 Test. at 266.)

132. Bobby Brant, Meyer's attorney, never took the position in communications with PRG or PRG's counsel that the Termination Transaction was not completed. (Brant 1/24/03 Test. at 245-47.)

133. Neither Meyer nor Rudolph ever told David Horn that the Termination Transaction did not close. (Horn 2/5/03 Test. at 233-35.)

134. With the exception of recording the Note, VRF has accounted for the Termination Transaction as having occurred. (Rudolph 1/24/03 Test. at 208.)

135. Meyer mortgaged the Land and Building, Meyer took his 35% interest the Ridge Lake ASC, and VRF took control of the VRF practice assets. (Meyer 1/24/03 Test. at 147-48.) These actions support a finding of fact that the transaction closed.

136. VRF has, at all times since January 31, 2000, treated the VRF practice assets as if they were owned by VRF. (Meyer 1/24/03 Test. at 147.)

137. RME has, at all times since January 31, 2000, treated the Land and Building as if it was owned by RME. (Meyer 1/24/03 Test. at 147-48; Warranty Deed, Pls.' Ex. 219;

Termination Agreement - Brant's copy, Pls.' Ex. 311 at tab 35; Amended Deed of Trust, Pls.' Ex. 376.)

138. Neither Michael Yeary nor Jim Ryan told Meyer on or about January 31, 2000 that PRG would release the obligations under the $1.2 million Note. (Meyer 1/24/03 Test. at 157.)

139. Meyer never told Houlihan Lokey that he thought he was entitled to forgiveness of the Note. (Margulis 1/28/03 Test. at 242.)

140. Shortly after the Note was executed, Meyer began attempts to have the Note forgiven by EyeCorp, which is inconsistent with his claim in this case before trial that the Note and Guaranty were not effective. (*See, e.g.* 12/13/00 Fax from Rudolph to Yeary, Pls.' Ex. 257; 1/24/01 Fax from Rudolph to Yeary, Pls.' Ex. 260; 1/28/01 Memo from Meyer to Yeary, Pls.' Ex. 261; 1/29/01 Fax from M. Williams to Yeary, Pls.' Ex. 262; 1/30/01 Letter from Meyer to Yeary, Pls.' Ex. 263; 1/30/01 Letter from Yeary to Meyer, Pls.' Ex. 264.)

141. On June 26, 2000, EyeCorp sent letters to VRF, Meyer, Linn, Browning and Krauss to notify them that a default had occurred under the Note and Guaranty and to declare the full amount of unpaid principal and accrued but unpaid interest immediately due and payable. VRF, Meyer, Linn, Browning and Krauss refused and continue to refuse to make any payments on the Note or Guaranty. (Demand letters, Pls.' Exs. 241-42, 246-48, 250-51, 253, 794-95; Nicolaou's 1/29/03 Test. at 237-39.)

Lack of Adequate Accounting Records for EyeCorp

142. Plaintiffs' expert, Philip Innes, is an expert in accounting, valuation and damages analysis. (Innes 1/27/01 Test. at 61.)

143. There are not adequate records from which to create accurate and reliable

EyeCorp financial statements for any of the dates of the transfers at issue. (Innes 1/27/01 Test. at 69.) From the exhibits and testimony offered, this Court is unable to determine a true picture of EyeCorp's assets and liabilities.

144. PRG reported its financial results and tax returns on a consolidated basis and did not maintain separate financial statements for EyeCorp. (Innes 1/27/01 Test. at 73-74; Hakala 2/7/03 Test. at 177-78; Nicolaou 2/10/03 Test. at 168.)

145. Separate, reliable financial statements do not exist for EyeCorp since its merger with PRG. (Meyer 1/24/03 Test. at 165; Rudolph 1/24/03 Test. at 204; Delgado 1/24/03 Test. at 219-20; Burch 1/24/03 Test. at 261; Innes 1/27/03 Test. at 69, 73-74; Moore 1/29/03 Test. at 48-50; Haney 1/30/03 Test. at 28-29; Nicolaou 2/25/03 Test. at 68; Consol. trial balance, Pls.' Ex. 325; Moore 12/24/02 report, Pls.' Ex. 448; Innes reports, Pls.' Exs. 283, 447.)

146. Some creditors viewed PRG on a consolidated basis and viewed PRG's financial statements on a single entity basis. (Innes 1/27/01 Test. at 109-10.) However, EyeCorp had creditors in its bankruptcy schedules which were different from PRG. The bankruptcy schedules for EyeCorp have not been amended. PRG and EyeCorp filed separate bankruptcy petitions and proceeded as separate debtors. The plan confirmed by the Bankruptcy Court maintains that separateness.

147. PRG is not an appropriate entity upon which solvency should be tested for EyeCorp. PRG and EyeCorp are separate and distinct entities, with separate assets and creditors.

148. Because of the way PRG maintained its accounting records, it is not possible to create accurate and reliable financial statements for EyeCorp as of December 31, 1998, December 31, 1999 or January 31, 2000. (Innes 1/27/01 Test. at 102; Innes reports, Pls.' Exs. 283,

447.)

149. The EyeCorp financial information contained in various tax filings was said in trial to be inaccurate, as it was derived from PRG's ledgers that did not accurately track subsidiary information. (Innes 1/27/01 Test. at 118-19; Nicolaou 2/10/03 Test. at 165-166.) However, the tax returns have not been amended.

Solvency and Adequacy of Capital—PRG

150. Sharon Moore, plaintiffs' expert, is an expert in the areas of valuation and solvency analysis. (Moore 1/29/03 Test. at 11-12.)

151. PRG was insolvent as of June 30, 1998, December 31, 1998, December 31, 1999 and January 31, 2000. At the same dates, PRG was engaged in business or transactions, or was about to engage in businesses or a transaction, for which it had inadequate capital. (Moore 1/29/03 Test. at 12-14; Moore 7/31/02 report, Pls.' Ex. 461.) Moore's testimony on these points is credible.

152. PRG's liabilities exceeded its assets at June 30, 1998, at December 31, 1998, and at December 31, 1999. The result for January 31, 2000 would not have been significantly different from December 31, 1999. (Moore 1/29/03 Test. at 45-46; Moore 7/31/02 report, Pls.' Ex. 461.) Moore's testimony on these points is credible.

153. Defendants do not dispute the insolvency of PRG for December 31, 1998, December 31, 1999 or January 31, 2000. (Hakala 2/7/03 Test. at 188-89.)

154. PRG was in default on its loan covenants and had lost its top management. PRG also had demonstrated negative earnings for the latest twelve months. PRG's cash balance at June 30, 1998 was less than the amount required to cover one month's expenses. (Moore 2/10/03 Test. at 177-78.)

155. While Defendants' expert, Dr. Hakala, criticized Ms. Moore's capitalization of income approach, the approach he suggested would result in a lower valuation for PRG as of June 30, 1998 than the value determined by Ms. Moore. (Moore 2/10/03 Test. at 181-82.)

156. Dr. Hakala's opinion that Meyer's July 25, 1998 letter of intent indicates that PRG was solvent is not based in fact. The transaction contemplated by the LOI was never consummated. (Hakala 2/7/03 Test. at 83; Moore 2/10/03 Test. at 172-73.)

157. Ms. Moore's testimony on the insolvency of PRG is credible. Dr. Hakala's testimony on the solvency of PRG was not persuasive.

Solvency and Adequacy of Capital—EyeCorp

158. The limited financial records that are available for EyeCorp are not reliable and accurate. (Moore 1/29/03 Test. at 52.)

159. Ms. Moore purported to reconstruct financial records for EyeCorp from which to assess solvency. In doing so, she assumed certain facts and relied on the limited financial records for EyeCorp that were available as a starting point for a solvency analysis. However, for example, she rejected certain financial information for EyeCorp. (Moore 1/29/03 Test. at 50-52.) Ms. Moore referred to her analysis as "hypothetical." Ms. Moore's testimony on these points was not persuasive.

160. For example, Ms. Moore did not rely on the EyeCorp tax return balance sheets. She adjusted the tax return balance sheets for EyeCorp for unrecorded liabilities to PRG related to PRG's payment of EyeCorp's liabilities to third parties as necessary to reflect EyeCorp's economic position. (Moore 1/29/03 Test. at 58-60.)

161. The Plaintiffs did not establish, by a preponderance of the evidence, that

EyeCorp was insolvent as of December 31, 1998, December 31, 1999 and January 31, 2000, under either the balance sheet test and the test for adequate capital. (Moore 1/29/03 Test. at 12-14.)

162. In fact, EyeCorp's sworn bankruptcy filings suggest solvency for that entity. EyeCorp's bankruptcy schedules reflect assets valued at $8,443,168. (Declaration Concerning Debtor's Schedules, Pls.' Ex. 457.)

163. The actual sales proceeds for EyeCorp's assets sold after January 31, 2000 were approximately $3 million. (Moore 1/29/03 Test. at 206.) This amount greatly exceeds the allowed claims against EyeCorp. Further, EyeCorp has paid a substantial dividend to its equity interest holder, PRG. (Moore 1/29/03 Test. at 206.) Such actions indicate solvency for EyeCorp for all relevant times.

164. Plaintiffs' valuation and solvency expert testified that EyeCorp was engaged or was about to engage in business or a transaction for which it had inadequate capital. That testimony is not persuasive. The Court concludes that Plaintiff did not meet its burden of proof. EyeCorp had only two vendor creditors when it filed bankruptcy. Therefore, it was paying its debts in the ordinary course.

165. The testimony of Ms. Moore regarding the insolvency of EyeCorp was not persuasive and therefore, the Court finds that Plaintiffs did not meet their burden of proof.

Actual Intent

166. The Plaintiffs did not establish by a preponderance of the evidence that the transfers by PRG and EyeCorp – the guaranty fee payments, LOI expenses, VRF practice assets, and 35% interest in Ridge Lake ASC – were made with actual intent to hinder, delay, or defraud any entity to which PRG or EyeCorp were, or became, indebted.

167. However, the transfer by EyeCorp of the Land and Building was made with actual intent to hinder, delay, or defraud any entity to which EyeCorp was, or became, indebted, and after a creditor's claim arose. (Nicolaou 1/29/03 Test. at 241-43, 250; Arthur Andersen work papers used by Innes to calculate appropriate price for VRF practice assets, Pls.' Ex. 312; Declaration Concerning Debtor's Schedules, Pls.' Ex. 457.)

Bankruptcy Proceedings

168. On February 1, 2000, PRG filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code. (SF 39.)

169. On May 25, 2000, EyeCorp filed a voluntary petition for relief. (SF 40.)

170. According to Ms. Nicolaou, EyeCorp's bankruptcy schedules do not reflect inter-company debt to PRG because PRG and EyeCorp believed that EyeCorp's third-party creditors would be fully paid, and because PRG was the equity holder of EyeCorp, PRG would receive the remaining proceeds from EyeCorp's liquidation whether such funds were paid as debt or dividend. (Nicolaou 2/10/03 Test. at 165.) To the Court, this explanation does not appear to be sufficient reason not to schedule inter-company obligations. As filed, the schedules of EyeCorp indicate that EyeCorp had more than sufficient assets to satisfy the claims of its creditors.

171. This Court's Order Confirming Modified First Amended Joint Liquidating Plan Under Chapter 11 of Physicians Resource Group, Inc. and EyeCorp, Inc. was entered on December 1, 2000. (SF 41.)

172. The PRG bankruptcy estate has unsecured creditors which have not yet been paid in full. (Nicolaou 1/29/03 Test. at 251.)

173. EyeCorp had unsecured creditors at or around the time of the VRF

Termination Agreement, and also at its bankruptcy filing. (*See*, Nicolaou 1/29/03 Test. at 241-243, 250; Declaration Concerning Debtor's Schedules, Pls.' Ex. 457.) In fact, Counter-Claimant VRF asserts it holds claims against EyeCorp, which would have existed at the time of the VRF Termination Agreement.[1]

174. At or around the time of EyeCorp's bankruptcy filing, EyeCorp had at least two undisputed unsecured creditors: Bank of America, N.A. and Federal Express Corporation. (Nicolaou 1/29/03 Test. at 241-242; Declaration Concerning Debtor's Schedules, Pls.' Ex. 457 at 511.)

175. At or around the time of EyeCorp's bankruptcy filing, EyeCorp had many disputed unsecured creditors. (Nicolaou 1/29/03 Test. at 242-43; Declaration Concerning Debtor's Schedules, Pls.' Ex. 457 at 511-26.)

176. EyeCorp also had disputed unsecured creditors prior to filing bankruptcy because several practices had notified EyeCorp in 1998 that they believed EyeCorp had breached service agreements. (Nicolaou 1/29/03 Test. at 243-45; Breaches, Terminations, Litigation, Defs' Defs.' Ex. 78.) VRF now claims in its counterclaim that it is owed amounts from EyeCorp.

177. EyeCorp had several undisputed and disputed creditors at all times in the regular operation of its business. (Nicolaou 1/29/03 Test. at 250.)

178. Several practices filed proofs of claim alleging that their services agreements had been breached many years prior to EyeCorp's bankruptcy. (Nicolaou 1/29/03 Test., at 245-49; Wesson Proof of Claim, Pls.' Ex. 767.1; McMahon Proof of Claim, Pls.' Ex. 767.2; Dean Proof of Claim, Pls.' Ex. 767.4.)

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[1] Such claims were released under that agreement.

179. EyeCorp received a notice of breach from Matthew B. Wesson on October 8, 1998. Wesson terminated his services agreement on December 1, 1998 and then filed a proof of claim nominally against EyeCorp, but under the PRG case number, in 2000. His claim was scheduled by EyeCorp and is still pending. A reserve has been established for his claim in the EyeCorp bankruptcy proceeding. (Nicolaou 2/5/03 Test. at 118-121.)

180. In the bankruptcy filings, PRG and EyeCorp disclosed the Note and Defendants' refusal to honor their obligations. (Disclosure Statement at sec. III.I, Pls.' Ex. 465; Declaration Concerning Debtor's Schedules at 499, Pls.' Ex. 457.))

181. Any conclusion of law may also be deemed a finding of fact.

CONCLUSIONS OF LAW

The Fraudulent Transfer Claims in General

182. Plaintiffs have asserted fraudulent transfer claims (Counts 1-7) under both intentional and constructive fraudulent transfer theories under Texas and federal law. *See* 11 U.S.C. § 548(a)(1)(A) (intentional claims under federal law); 11 U.S.C. § 548(a)(1)(B) (constructive fraud claims under federal law); TEX. BUS. & COM. CODE § 24.005(a)(1) (intentional fraud claims under Texas law); TEX. BUS. & COM. CODE §§ 24.005(a)(2), 24.006(a) and (b) (constructive fraud claims under Texas law). The Texas statutes are made applicable by 11 U.S.C. § 544. Under 11 U.S.C. § 550, plaintiffs may recover either the property fraudulently transferred or the value of such property.

183. Counts 1-7 each include the following transfers (the "Meyer transfers" or the "transfers at issue"): (1) Guaranty fee payments to Meyer in the amount of $270,000 credited or offset by EyeCorp against payments owed by VRF between November 1997 and April 1998; (2)

Payments in the amount of $453,445 paid out of EyeCorp accounts for expenses incurred by Meyer in connection with his LOI; (3) Payments in the amount of $96,172 paid by PRG for expenses incurred by Meyer in connection with his LOI; (4) The transfer of a 35% interest in the RLASC by EyeCorp to RME; (5) Transfer of the Land and Building by EyeCorp to RME; and (6) Transfer of the VRF practice assets by EyeCorp to VRF.

PLAINTIFFS' COUNT ONE:
FRAUDULENT TRANSFER UNDER 11 U.S.C. § 548(a)(1)(A)

184. A trustee may avoid a transfer under 11 U.S.C. § 548(a)(1)(A) if: (1) The transfer was made on or within one year before the date of filing for bankruptcy; and (2) The debtor made the transfer with actual intent to hinder, delay or defraud any creditor that the debtor was or became indebted to on or after the date that such transfer was made. *See* 11 U.S.C. § 548(a)(1)(A).

185. The Court concludes that only the transfer of the Land and Building is avoidable under this count. Plaintiffs failed to establish that the transfer of the interest in RLASC and of VRF's practice assets was made with actual intent to hinder, delay or defraud.

186. The record is unclear as to the dates EyeCorp and PRG made the transfers in connection with the LOI expense reimbursement. The record does reflect that the last transfer was made on April 9, 1999, but does not reflect whether that transfer was from a PRG account or an EyeCorp account. Plaintiffs failed to carry their burden of showing that the PRG transfers occurred on or within one year before the date of filing for bankruptcy. It is clear, in any event, that the EyeCorp transfers occurred more than one year before EyeCorp filed bankruptcy. Thus, the Court finds that the transfer of LOI expense reimbursement and guarantee fees predate PRG and EyeCorp's respective bankruptcy petitions by more than 1 year and are therefore, not recoverable under §

548(a)(1)(A).

187. The transfer of the Land and Building by EyeCorp described under Count 1 was made with actual intent to hinder, delay or defraud EyeCorp's creditors that the debtors were or became indebted to on or after the date that such transfers were made. EyeCorp needs only prove the existence of "*any entity* to which the debtor was or became, *on or after* the date that such transfer was made or such obligation was incurred, indebted." 11 U.S.C. § 548(a)(1) (emphasis added). The testimony of Karen Nicolaou and Byron Haney, both of whom stated that creditors existed "on or after" defendants' transfers for EyeCorp is credible, and establishes that a creditor existed at the relevant times under section 548(a)(1). (Nicolaou 1/29/03 Test. at 245-47, 250-51; Haney 1/30/03 Test. at 16.) Alternatively, the bankruptcy schedules establish that EyeCorp had creditors after the date of the transfer. Further, VRF has asserted a claim against EyeCorp in these proceedings. Thus, the transfer constitutes a fraudulent transfer of the Land and Building, and is avoidable under 11 U.S.C. § 548(a)(1).

Proof of Intent

188. The Oversight Committee can prove intent to hinder, delay or defraud either through direct evidence of intent or by establishing intent through the various badges of fraud that have been developed. The Court concludes that the Oversight Committee has established intent through both direct evidence and by proof of the badges of fraud.

189. "The three intents that the transferor can form — to hinder, delay, or defraud — are distinct elements, any of which is sufficient to render the disputed transaction fraudulent." 5 COLLIER ON BANKRUPTCY § 548.04[1] (15th ed. rev. 2002).

The words "hinder" and "delay" have their own significance: they embrace

> . . . the solvent person's deliberate effort to stave off creditors by putting property beyond their reach even when the purpose of that is not to cheat them of ultimate payment but only to wrest from them time to restore the debtor's affairs.

Klein v. Rossi, 251 F. Supp. 1, 2 (E.D.N.Y. 1966) (citation omitted).

190. Although courts generally look to the transferor's intent, the transferee's intent is relevant in situations where the transferee dominates the transaction. When the transferee is in a position to dominate or control the debtors' disposition of property, "his intent to hinder, delay, or defraud creditors may be imputed to the debtor so as to render the transfer fraudulent," regardless of the actual purpose of the debtor transferor. *Freehling v. Nielson*, 44 B.R. 863, 872 (Bankr. S.D. Fla. 1984); 5 COLLIER ON BANKRUPTCY § 548.04[1] (15th ed. rev. 2002).

191. Meyer was Chairman of the Board of PRG at the time of the transfers at issue and was PRG's largest shareholder. Transferee RME is a partnership in which Meyer is a general partner. Mr. Margulis testified that Dr. Meyer influenced the Termination Transaction. Meyer exercised substantial influence and control over the affairs of EyeCorp and PRG.

192. Dr. Meyer held official and unofficial positions of influence in the affairs of PRG and EyeCorp. His hands were on most important transactions and decisions by the companies. The record suggests that Meyer, as Chairman of PRG, knew the relative importance of the closing of the VRF Termination Transaction to the business of PRG and EyeCorp. He used his position and the companies' needs to extract the Land and Building for virtually no consideration. His representations to EyeCorp, PRG and their professionals that he was to obtain the property for nothing was not accurate. While he may have abstained from actually voting on the transfer of the Land and Building, the evidence is clear that Meyer had substantial direct and indirect influence on

PRG and EyeCorp to complete the transaction, including the transfer of the Land and Building. The Court finds that Meyer, individually and as the representative of RME, had actual intent to hinder, delay or defraud EyeCorp's creditors. Meyer's intent is relevant in the determination of EyeCorp's intent.

The Badges of Fraud

193. EyeCorp's actual intent to hinder, delay or defraud its creditors was also proven through the existence of numerous badges of fraud, and the absence of credible evidence by the Defendants to establish that the transfer was not fraudulent.

194. Debtors will rarely admit to fraudulent intent. Therefore, to determine whether the transfers were made with the actual intent to hinder, delay or defraud under 11 U.S.C. § 548(a)(1)(A), courts consider the existence of badges of fraud. *See Roland v. United States*, 838 F.2d 1400, 1403 (5th Cir. 1988); *Diamant v. Sheldon L. Pollack Corp.*, 216 B.R. 589, 591 (Bankr. S.D. Tex. 1995); *United States v. Klutts (In re Klutts)*, 216 B.R. 558, 561 (Bankr. W.D. Tex. 1997); 5 COLLIER ON BANKRUPTCY § 548.04[2][b] (15th ed. rev. 2002).

195. The badges listed in § 24.005(b) of the Texas Business and Commerce Code may also be considered in actions under 11 U.S.C. § 548(a)(1)(A). *See Weaver v. Kellogg*, 216 B.R. 563, 577 (S.D. Tex. 1997). The badges of fraud enumerated under § 24.005(b) include the following:

1. The transfer was to an insider;
2. The debtor retained possession or control of the transferred property;
3. The transfer was concealed;
4. The transfer was made after suit or threat of suit by any creditors;
5. The transfer was of substantially all of the Debtor's assets;
6. The debtor absconded;
7. The debtor removed or concealed assets

8. The value of the consideration received was not reasonably equivalent;
9. The debtor was insolvent or became insolvent shortly after the transfer;
10. The transfer occurred shortly before or after a substantial debt was incurred; and,
11. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

TEX. BUS. & COM. CODE ANN. § 24.005(b) (Vernon 2002).

196. Plaintiffs had the initial burden to prove the existence of badges of fraud by a preponderance of the evidence. *See Mancuso v. T. Ishida USA, Inc. (In re Sullivan)*, 161 B.R. 776, 779-80 (N.D. Tex. 1993). Once they met their burden (under both state and federal law), they proved a strong case of actual fraudulent intent. *See BMG Music v. Martinez*, 74 F.3d 87, 90 (5th Cir. 1996) (holding that the badges shown raised a strong inference of fraud); *Diamant*, 216 B.R. at 591 ("several [badges of fraud] when considered together may afford a basis from which its existence is properly inferable"); *United States v. Shepherd*, 834 F. Supp. 175, 180 (N.D. Tex. 1993) ("a concurrence of many [badges] in the same case will always make out a strong case of fraud"), *rev'd on other grounds*, 23 F.3d 923 (5th Cir. 1994). Once the indicia of fraud are shown and a prospect of fraud arises, then the burden shifts to the Defendants to establish that the transfer was not fraudulent. *See In re Klutts*, 216 B.R. 558 (Bankr. W.D. Tex. 1997).

Insider Status for Meyer and RME

197. It is not disputed that Meyer was Chairman of PRG's Board at the time of the transfers at issue. He had appointed the officers and sole director of EyeCorp. The evidence establishes that Meyer influenced PRG's actions, including in EyeCorp matters. RME is a partnership in which Meyer is general partner. The Court concludes that Meyer, along with his

related entity, RME, was an insider within the meaning of 11 U.S.C. § 101(31)(B).[2]

Lack of Consideration or Reasonably Equivalent Value

198. Reasonably equivalent value requires a comparison of the value of what went out with the value of what came in. *Southmark Corporation v. Riddle (In re Southmark)*,138 B.R. 820 (Bankr. N.D. Tex. 1992). There need not be a dollar for dollar exchange to satisfy the reasonably equivalent test. *Id.* Determining whether the value received was reasonably equivalent is a question of fact and "considerable latitude must be allowed to the trier of the facts." *Texas Truck Ins. Agency v. Cure (In re Dunham)*, 110 F.3d 286, 289 (5th Cir. 1997) (citing *Mayo v. Pioneer Bank & Trust Co.*, 270 F.2d 823 (5th Cir. 1959), *cert. denied*, 362 U.S. 962 (1960)). The test for reasonably equivalent value is "whether the investment conferred an economic benefit on the debtor; which benefit is appropriately valued as of the time the investment was made." *Butler Aviation Int'l v. Whyte (In re Fairchild Aircraft Corp.)*, 6 F.3d 1119, 1127 (5th Cir. 1993) (*citing In re Rodriguez*, 895 F.2d 725, 727 (11th Cir. 1990)); *see also Rubin v. Manufacturer's Hanover Trust Co.*, 661 F.2d 979, 991 (2nd Cir. 1981) (holding that the test for fair consideration is whether the transfers deplete the estate without bringing in a corresponding value from which the creditors can benefit); *Cooper v. Ashley Communications, Inc. (In re Morris Communications NC, Inc.)*, 914 F.2d 458, 466 (4th Cir.

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[2] For corporate debtors, an "insider" under 11 U.S.C. 101(31)(B) includes:

(i) director of the debtor;
(ii) officer of the debtor;
(iii) person in control of the debtor;
(iv) partnership in which the debtor is a general partner;
(v) general partner of the debtor; or
(vi) relative of a general partner, director, officer, or person in control of the debtor.

11 U.S.C. § 101(31)(B).

1990).

199. The Court finds that the components of the Termination Transaction, other than the Land and Building, comport closely enough to the Houlihan Lokey Formula to be reasonably equivalent. Obviously, there was a difference of opinion at trial over the right amounts. However, the relative differences were not significant. Therefore, for the non-real estate claims, there is no lack of reasonably equivalent value badge of fraud.

200. The Court finds that at the time of the PRG/EyeCorp merger, PRG and/or EyeCorp did not agree to return the Land and Building to Meyer for little or no consideration. Further, the fact that PRG and EyeCorp could not independently verify that Meyer's claim for the return of "his land and building," other than to accept Meyer's version of events, shows that PRG and EyeCorp could not have bargained for reasonably equivalent value with respect to the Land and Building.

201. Defendants offered credible evidence of the value of the transfers by PRG and EyeCorp for all transfers save and except the Land and Building. The transfer of real estate with a stipulated value of $4.65 million for consideration of $290,255 was clearly for less than reasonably equivalent value. The gross disparity between value given and price received for the Land and Building is such that the Court can only conclude that there is a lack of reasonably equivalent value badge of fraud for the Land and Building. The Court concludes that EyeCorp did not receive reasonably equivalent value for the transfers of the Land and Building at issue and the lack of reasonably equivalent value is of such a magnitude to be a badge of fraud.[3]

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[3] When the transfer is made without adequate consideration, it raises a presumption of fraudulent intent that establishes a *prima facie* case and shifts the burden of proof. *Sommers v. Sorce (In re Major Funding Corp.)*, 126 B.R. 504, 508 (Bankr. S.D. Tex. 1990).

Concealment

202. Resurgence was not apprised of the transfer of the Land and Building before the transaction closed. The evidence establishes that PRG's major creditor was not apprised of the terms of the real estate transfer until after PRG filed bankruptcy. Resurgence is a creditor of PRG, not EyeCorp. The Court concludes that PRG and EyeCorp did not disclose to Resurgence information concerning the transfers of the Land and Building. This concealment is a badge of fraud. However, because Resurgence is a creditor of PRG, not EyeCorp, this badge of fraud not given much weight.

203. Dr. Meyer gave EyeCorp and PRG a story regarding the Land and Building which is not credible or supported by the record. In a real sense, he concealed or misstated the facts to get the Land and Building back. The transfer of the Land and Building, as set out in Dr. Meyer's story that the Land and Building were always supposed to be transferred to him for no consideration, is a badge of fraud, to which weight is given.

Timing

204. Most of the transfers at issue were made within hours of PRG's bankruptcy filing, and only several months before EyeCorp filed. Dr. Meyer knew of (and, indeed, voted in favor of) the plan to file bankruptcy on February 1, 2000. Both the transferor and the transferee desired to complete the transfers before PRG's bankruptcy, apparently because they believed that the transfers could not have occurred once PRG filed for bankruptcy. The Court concludes that this action is evidence of an attempt to get around the bankruptcy process, and therefore, indicative of an intent to hinder, delay or defraud creditors. This action is found also to be a badge of fraud, but one which is given less weight.

Absconding

205. Transferred property is absconded when the proceeds of the transfer are carried, removed or stolen immediately after their receipt. *See, e.g., Steder v. Surplus Props., Inc. (In Re Steder)*, No. 02-B-00173, No. 02-A-00229, 2002 WL 1729502, at *5 (Bankr. N.D. Ill. July 25, 2002); *In re Bennett Funding Group, Inc.*, 220 B.R. 743, 755 (Bankr. N.D.N.Y. 1997).

206. The transferee mortgaged the property at 825 Ridge Lake Boulevard immediately after the transfer. It will be more difficult for Plaintiffs to recover the Land and Building now that it is encumbered. Encumbering the property has the practical effect of attempting to place it beyond the reach of creditors. This action is some evidence of intent to place the Land and Building beyond the reach of EyeCorp's creditors and is a badge of fraud, although given less weight.

Defendants' Burden of Proving Legitimate Supervening Purpose

207. Plaintiffs established a "confluence of badges of fraud." "Once these indicia of fraud are shown, and the presumption of fraud arises, then the burden shifts to the defendant to establish that the transfer was not fraudulent." *In re Klutts*, 216 B.R. at 562; *see also Tavenner v. Smoot*, 257 F.3d 401, 408 (4th Cir. 2001) ("This presumption establishes the trustee's prima facie case and shifts the burden of proof to the debtor to establish the *absence* of fraudulent intent."). Defendants had the burden to produce some "significantly clear evidence of a legitimate supervening purpose" for the transfers at issue. *See Kelly v. Armstrong*, 141 F.3d 799, 802 (8th Cir. 1998); *Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 34 F.3d 800, 806 (9th Cir. 1994); *Max Sugarman Funeral Home, Inc. v. A.D.B. Investors*, 926 F.2d 1248, 1254-55 (1st Cir. 1991). Defendants have met their burden of proof on the VRF and RLASC transfers; however, they have not met their burden

on the Land and Building transfer.

208. With respect to the transfers of the VRF and the interest in the RLASC, Defendants have established a legitimate supervening purpose. At the relevant periods, it was public knowledge that practices were being sold. Evidence was offered at the trial indicating that the VRF and RLASC transfers were to serve as a template for other similar transactions for other practices. The Houlihan Lokey formula was followed for the VRF and RLASC transfers, though there is a calculation dispute. The VRF and RLASC transfers comport closely enough with the Houlihan Lokey methodology, although arguably not exactly. There is not with these transfers the shocking differential in price present with the sale of the Land and Building. To the extent there are badges of fraud for the VRF and RLASC transfer, the Court finds that a legitimate supervening purpose exists to rebut the presumption that a fraudulent transfer occurred.

209. With respect to the Land and Building, the only basis given for the transfer was Dr. Meyer's claim that he was supposed to receive the real property from EyeCorp for no consideration. This testimony was not supported by the record or the testimony of witnesses who were present at the alleged time the promise would have been made. The Defendants have failed to show any purpose, much less a legitimate supervening purpose.

210. Meyer's extraction of the Land and Building for little consideration, in light of his position at PRG and his knowledge that PRG and EyeCorp desperately needed to sell the lion's share of their assets and that future physician buybacks would only occur if Meyer's transaction closed, can be nothing other than a transfer with intent to hinder, delay or defraud.

211. Defendant RME is therefore liable under this Count for the return of the Land and Building or the value thereof.

PLAINTIFFS' COUNT TWO:
FRAUDULENT TRANSFER UNDER 11 U.S.C. § 548(a)(1)(B)

212. A trustee may avoid a transfer under 11 U.S.C. § 548(a)(1)(B) if:

- The transfer was made on or within one year before the date of filing for bankruptcy; and
- The debtor received less than a reasonably equivalent value in exchange for the transfer; and

One of the three following elements is satisfied:

(1) the debtor was insolvent on the date of the transfer, or became insolvent as a result of the transfer;

(2) the debtor was engaged or was about to engage in business or a transaction for which any property remaining with the debtor was an unreasonably small capital; or

(3) the debtor intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

See 11 U.S.C. § 548(a)(1)(B).

213. All transfers by PRG at issue occurred more than one year before the petition date, and are therefore not avoidable under this section.

214. EyeCorp was solvent, had sufficient capital, and did not incur an obligation beyond its ability to pay.

215. Plaintiffs cannot recover from Defendant's under this count.

PLAINTIFFS' COUNT THREE:
FRAUDULENT TRANSFER UNDER 11 U.S.C. § 544(b)
AND TEXAS BUSINESS AND COMMERCE CODE § 24.005(a)(1)

216. A transfer is fraudulent under TEX. BUS. & COM. CODE § 24.005(a)(1) if:

- A creditor's claim arose either before or within a reasonable time after the debtor made a

transfer; and

- The debtor made the transfer with actual intent to hinder, delay or defraud a creditor.

See TEX. BUS. & COM. CODE § 24.005(a)(1).

217. The analysis for this count is essentially the same as for Count 1 with respect to the Land and Building. Plaintiffs proved badges of fraud for the Land and Building transfer, however they did not make a sufficient showing for the other Termination Transfers.

218. Defendants offered no credible evidence to refute the badges of fraud on the Land and Building.

219. With respect to the payment of Guaranty Fees and reimbursement of LOI expenses from EyeCorp, Plaintiffs failed to show actual intent to hinder, delay or defraud EyeCorp's creditors, either through direct evidence or through the badges of fraud. Guaranty fees were paid to at least one other guarantor. With respect to PRG's reimbursement of LOI expenses, Plaintiffs failed to show actual intent to hinder, delay or defraud PRG's creditors. The transfers may be unusual, but the record does not support a finding that they were actually fraudulent. Although certain badges of fraud are present in connection with these transactions, the Court finds that Plaintiffs failed to carry their burden of proof with respect to actual intent. In addition, Defendants explained credibly the guaranty fees and the LOI expense reimbursement sufficient to rebut any claim of actual fraud.

220. Defendant RME is therefore liable under this Count for the return of the Land and Building or the value thereof.

PLAINTIFFS' COUNT FOUR:
FRAUDULENT TRANSFER UNDER 11 U.S.C. § 544(b)
AND TEXAS BUSINESS AND COMMERCE CODE § 24.005(a)(2)

221. A transfer is fraudulent under section 24.005(a)(2) of the Texas Business and

Commerce Code if:

- A creditor's claim arose either before or within a reasonable time after the debtor made a transfer; and
- The debtor did not receive reasonably equivalent value in exchange for the transfer; and
- One of the two following elements are satisfied:
    1. the debtor was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
    2. the debtor intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

See TEX. BUS. & COM. CODE § 24.005(a)(2).

222. Plaintiffs failed to carry their burden on proving that EyeCorp was either engaged or about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction or that EyeCorp intended to incur, or believed or reasonably believed that it would incur, debts beyond its ability to pay as they became due. Thus, EyeCorp's claim under Count Four is denied.

223. Resurgence's claim arose on or about December 1997, prior to the LOI transfers by PRG. PRG did not receive reasonably equivalent value for the $96,172 paid to Meyer. Meyer failed to satisfy the conditions of the LOI. Ultimately, PRG terminated the LOI. It is unusual for the target of a proposed buyout to reimburse the prospective purchaser for fees incurred in its attempt when the purchaser fails to meet the conditions of the LOI. Defendants did not prove any quantifiable value received by PRG. Therefore, the Court finds that PRG received little or no value

in exchange for its payment of $96,172 to reimburse Meyer for part of his LOI expenses.

224. PRG engaged in business after the payment of the LOI expenses for which it had unreasonably small capital. PRG also should have known that it would incur debts for which it lacked the ability to pay. Accordingly, PRG is entitled to recover amounts paid as LOI expenses by it.

PLAINTIFFS' COUNT FIVE:
FRAUDULENT TRANSFER UNDER 11 U.S.C. § 544(b)
AND TEXAS BUSINESS AND COMMERCE CODE § 24.006(a)

225. A transfer is fraudulent as to a creditor under section 24.006(a) of the Texas Business and Commerce Code if:

- The creditor's claim arose before the transfer was made;
- The debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer; and
- The debtor was insolvent at that time or became insolvent as a result of the transfer.

See TEX. BUS. & COM. CODE § 24.006(a).

226. For the reason's stated in Count Two, EyeCorp is unable to recover on this Count. PRG, however, can recover its payment of LOI expenses in the amount of $96, 172.

227. The reasons relating to PRG stated in Count Four above are adopted for Count Five. In addition the Court finds that PRG was insolvent at the time of the LOI transfers. Accordingly, PRG is entitled to recover the LOI reimbursement expenses it paid on behalf of Meyer.

PLAINTIFFS' COUNT SIX:
FRAUDULENT TRANSFER UNDER 11 U.S.C. § 544(b)
AND TEXAS BUSINESS AND COMMERCE CODE § 24.006(b)

228. A transfer is fraudulent under section 24.006(b) of the Texas Business and Commerce Code if:

- The creditor's claim arose before the transfer was made;
- The transfer was made to an insider for an antecedent debt;
- The debtor was insolvent at the time of the transfer; and
- The insider had reasonable cause to believe that the debtor was insolvent.

See TEX. BUS. & COM. CODE § 24.006(b).

229. For the reasons given under Count 2, Plaintiffs' claims under this Count are denied.

PLAINTIFFS' COUNT SEVEN:
RECOVERY OF THE TRANSFERS

230. To the extent the Meyer transfers are avoided in accordance with sections 544 or 548 of the Bankruptcy Code, PRG and EyeCorp may recover from defendants for the benefit of the estate, the property transferred or the value of the property, under 11 U.S.C. § 550(a).

PLAINTIFFS' COUNT TEN:
RECOVERY ON PROMISSORY NOTE

231. On or about January 28, 2000, as consideration for the VRF practice assets, VRF, for value received, executed, signed and delivered to EyeCorp a Note under which it promised to pay EyeCorp the principal sum of $1,282,183, plus accrued interest, via monthly principal and interest payments. The Note bears interest from January 28, 2000 at the rate of 10% per annum until maturity and from maturity until paid at lesser of the default rate or the maximum lawful rate (as

those terms are defined in the Note). The Note further provides that VRF will pay all costs and attorneys' fees in the event the Note is placed in the hands of an attorney for collection. In the Note, VRF waived demand, presentment for payment, notice of dishonor and of nonpayment, notice of intent to accelerate and notice of acceleration.

232. EyeCorp is the legal owner and holder of the Note and the person entitled to enforce it. *See Clark v. Dedina*, 658 S.W.2d 293, 295 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd); *see also Stucki v. Noble*, 963 S.W.2d 776, 782 (Tex. App.—San Antonio 1998, no pet.).

233. EyeCorp has made demand on VRF for payment of the Note. Nevertheless, VRF has failed and refused, and continues to fail and refuse, to make payment under the Note. As provided by its terms, the Note has become due in full, including the principal, all accrued interest and other fees, by virtue against VRF for the sum of $1,282,183, principal, plus accrued interest and other costs as provided under the Note.

234. Because VRF has failed to make any payments on the Note, EyeCorp has suffered and continues to suffer damages and is entitled to judgment against VRF for the sum of $1,282,183, principal, plus accrued interest and other costs as provided under the Note.

235. Defendants are estopped from asserting that EyeCorp cannot enforce the Note because they have received the benefit of the Note, and because of their actions subsequent to the execution of the Note. Meyer and his VRF medical practice have used and taken ownership of the medical practice assets (including the real estate housing those assets) that were transferred in exchange for the Note. Defendants cannot have it both ways. As one court has held:

> [Defendant] is estopped from attempting to rescind the sales agreement and/or the promissory note by his inaction and conduct between November 15, 1979, and March 22, 1984. Ratification

> occurs when a party recognizes the validity of a contract by acting under it, performing under it or affirmatively acknowledging it . . . Estoppel by contract, the theory urged by appellee, is a form of "quasi estoppel" based upon the idea that a party to a contract will not be permitted to take a position inconsistent with its provisions to the prejudice of another.

Zieben v. Platt, 786 S.W.2d 797, 802 (Tex. App.—Houston [14th Dist.] 1990, no writ).

236. Meyer admitted at trial that he knew he was obligated under the Note. VRF is liable to EyeCorp for the Note, plus accrued interest through the date of judgment. EyeCorp is also entitled to attorneys' fees as allowed by section 38.001 of the Texas Civil Practice and Remedies Code and as provided in the Note.

PLAINTIFFS' COUNT ELEVEN & GUARANTOR COUNT:
COLLECTION ON GUARANTY

237. In connection with the Note, on or about January 28, 2000, for consideration made and delivered, Meyer, Linn, Browning and Krauss executed an agreement under which they guaranteed payment of the Note. EyeCorp is the legal owner and holder of the Guaranty and the party entitled to enforce it. *See Marshall v. Ford Motor Co.*, 878 S.W.2d 629, 631 (Tex. App.—Dallas 1994, no writ); *see also Escalante v. Luckie*, 77 S.W.3d 410, 416 (Tex. App.—Eastland 2002, no pet.).

238. Despite EyeCorp's demand for payment from VRF after the Note became due and payable, no portion of the Note has been paid. VRF has failed and refused to pay and continues to fail and refuse to pay any part of the principal or interest due on the Note. There now remains due and unpaid on the Note the sum of $1,282,183 in principal, plus accrued interest and other costs as provided under the Note.

239. EyeCorp has demanded that Meyer, Linn, Browning and Krauss honor the

terms of the Guaranty and pay to EyeCorp the principal and interest due on the Note. Meyer, Linn, Browning and Krauss have failed and refused and continue to fail and refuse to pay any part of the principal or interest due under the Guaranty, and they now owe, jointly and severally, to EyeCorp the sum of $1,282,183 plus accrued interest and other costs as provided under the Note and Guaranty.

240. EyeCorp is also entitled to attorneys' fees as allowed by section 38.001 of the Texas Civil Practice and Remedies Code and as provided in the Guaranty.

PLAINTIFFS' COUNTERCLAIM FOUR:
FRAUD

241. Plaintiffs are entitled to recover on their fraud claim if they establish that:

- Defendants made a material representation;
- The representation was false;
- When defendants made the representation defendants knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion;
- Defendants made it with the intention that it should be acted upon by plaintiffs;
- Plaintiffs acted in reliance upon it; and
- Plaintiffs thereby suffered injury.

See Insurance Co. of North Am. v. Morris, 981 S.W.2d 667, 674 (Tex. 1998).

242. The Court finds that neither Meyer nor VRF have committed actual fraud relating to the Note and Guaranty, for which EyeCorp is entitled to damages.

PLAINTIFFS' COUNTERCLAIM FIVE:
PUNITIVE/EXEMPLARY DAMAGES

243. Plaintiffs are not entitled to punitive/exemplary damages..

DEFENDANTS' COUNTERCLAIM ONE:
BREACH OF CONTRACT

244. Defendants are not entitled to recover on their breach of contract claim because they cannot establish at least two essential elements of their claim:

- Nonperformance amounting to a breach of the contract; and
- Damages caused by the breach of the contract.

See Custom Built Homes v. G.S. Hinsen Co., No. 01-A-01-9511-CV-00513, 1998 WL 960287, at *3 (Tenn. Ct. App. Feb. 6, 1998) (citing *Life Care Ctrs. of Am., Inc. v. Charles Town Assocs. Ltd. Partnership, LPIMC, Inc.*, 79 F.3d 496, 514 (6th Cir. 1996)). Alternatively, any claim for breach of the VRF Services Agreement has been released in the Termination Agreement. (Pls.' Ex. 311, Tab 16.)

245. Meyer claimed that he did not receive some services under the MSA in 1997 and 1998. Defendants offered no credible evidence at trial that any written complaints, notices of default or notices of termination were ever sent by VRF to PRG or EyeCorp.

246. The evidence at trial established that VRF received substantial services under the MSA during the years 1997, 1998 and 1999.

247. At trial, defendants sought return of all management fees paid to EyeCorp in 1997 and 1998. But that is not the measure of damages set forth in their answers to plaintiffs' interrogatories filed December 9, 2002.

248. The Defendants have not established damages by a preponderance of the evidence.

249. Defendant did not establish a breach of contract by a preponderance of the evidence

250. The Court concludes that defendants failed to meet their burden of proving breach and are not entitled to any recovery under their claim. The Court further concludes that to the extent defendants could prove a breach of contract, defendants have not established that they suffered any damages as a result of any such breach.

251. Finally, the releases which are part of the Termination Transaction are fully enforceable as to the practice portion of the transaction. VRF and EyeCorp released each other, and no avoidance has been made of a transfer to VRF. Therefore, any claims by VRF against EyeCorp have been released.

DEFENDANTS' JUDICIAL ESTOPPEL DEFENSE

252. Judicial estoppel does not apply because Plaintiffs have not intentionally misled this Court in order to gain an unfair tactical advantage. *See Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 213 (5th Cir. 1999). Judicial estoppel does not apply in these circumstances.

253. The Disclosure Statement described the VRF Buyback and the fact that part of the consideration was "a note for approximately $1.28 million, guaranteed by the individual VRF practice physicians." (Disclosure Statement at 18, Pls.' Ex. 465.) The Disclosure Statement went on to explain that "[t]he note is currently in default for nonpayment and notice of default and acceleration has been provided to both VRF and the guarantors." (*Id.*) The Note was likewise disclosed in EyeCorp's schedules of assets filed on July 10, 2000 with a footnote stating that the Note was in default, that it had been accelerated, that the company thought the Note was collectible, and that no reserve had been provided on the Note. (Pls.' Ex. 457 (Declaration Concerning Debtor's Schedules at B-14-1)) This Court concludes that Plaintiffs adequately disclosed the promissory note

and Defendants' refusal to honor their obligations.

254. As to the fraudulent transfer claims of PRG, the Liquidating Plan and Disclosure Statement gave notice to all parties that potential fraudulent transfer claims existed and would be investigated and potentially pursued by the Liquidating Agent or the Oversight Committee. The Disclosure Statement provided that "all causes of action to recover preferences and fraudulent conveyances vest with the Liquidating Agent who is charged with investigating the merits of any such causes of action and, if desirable, prosecuting the same." The Liquidating Plan and Disclosure Statement further provide for the formation of the Oversight Committee, which "shall be vested with the sole discretion to pursue any claims or causes of action against the debtors' former officers, directors and professionals" and may also pursue other claims "under Chapter 5 of the Bankruptcy Code that the Liquidation Agent chooses not to pursue."

255. The Liquidating Plan provided "adequate information" as to the possibility that the Oversight Committee might pursue these claims. *See Texas Extrusion Corp. v. Lockheed Corp. (In re Texas Extrusion Corp.)*, 844 F.2d 1142, 1157 (5th Cir. 1988) ("While we acknowledge that the importance of the valuation and settlement of the various lawsuits between appellants and Lockheed to the Plan was not emphasized in the Disclosure Statement, we find that the bankruptcy court did not abuse its discretion in holding that the Disclosure Statement nevertheless was adequate to enable a reasonable creditor to make an informed judgment about the Plan."); *Peltz v. Worldnet Corp. (In re USN Communications, Inc.)*, 280 B.R. 573, 591 (Bankr. D. Del. 2002) ("In my opinion, it is both impractical and unnecessary for a Disclosure Statement and/or Plan to list each and every possible defendant against which a debtor or its representative may bring an avoidance action."). Because creditors were notified that potential claims may be pursued, judicial estoppel does not

apply. *See Union Carbide Corp. v. Viskase Corp. (In re Envirodyne Indus., Inc.)*, 183 B.R. 812, 825 (N.D. Ill. 1995) (holding that judicial estoppel was inapplicable because the creditors were on notice of the possibility of actions being brought where the plan had vested the debtor with all causes of action and the bankruptcy court had retained jurisdiction over such claims).

256. The Debtors here did not fail to disclose a claim in order to obtain an unfair advantage over Defendants or otherwise play "fast and loose with the courts." *See, e.g., In re Coastal Plains, Inc.*, 179 F.3d 197, 206 (5th Cir. 1999) (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)). The Debtors never stated that no claims existed, and, unlike the debtor in *Coastal Plains*, they never deceived PRG's creditors or this Court into believing that PRG's claims had been resolved. *See In re Costal Plains, Inc.*, 179 F.3d at 210; *see also Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 785 (9th Cir. 2001).

DEFENDANTS' RES JUDICATA DEFENSE

257. Plaintiffs' claims are not barred by the doctrine of *res judicata*. The fraudulent transfer cause of action was specifically carved out of the Plan, (Liquidating Plan § 9.5.5, Pls.' Ex. 371), and the definition of "property" is simply a preserved element of that cause of action. *See Ahl v. Mahan* (*In re Eastern Minerals & Chem. Co.*), 225 F.3d 330, 336-39 (3rd Cir. 2000) (holding that *res judicata* does not apply to post-confirmation action using veil piercing theories); *Ampace Freightlines, Inc. v. TIC Fin. Sys. (In re Ampace Corp.)*, 279 B.R. 145, 156 (Bankr. D. Del. 2002) (rejecting application of *res judicata* in an avoidance action because "both the Disclosure Statement and the Plan expressly reserved the Trustee's right to pursue avoidance actions"). Similarly, the Plan does not foreclose the debtors from proving insolvency under any available method.

DEFENDANTS' LACHES/WAIVER/ESTOPPEL DEFENSE

258. Plaintiffs are not barred from recovery based on the doctrines of laches, waiver or estoppel.

DEFENDANTS' RECOUPMENT/SETOFF DEFENSE

259. Plaintiffs are not barred from recovery in whole or in part. If they held a valid claim of setoff or recoupment, Defendants would be entitled to setoff only against Plaintiffs' Counts 10 and 11 because those are the only two claims for which a mutuality of interest exists. A party may not setoff against a fraudulent transfer claim. Defendants are not entitled to recoup against any of Plaintiffs' claims for two reasons. First, Defendants' only remaining counterclaim is not based on the same transaction on which Plaintiffs' claims are based. *See In re McConnell*, 934 F.2d at 667 ("Recoupment allows a defendant to reduce the amount of a plaintiff's claim by asserting a claim against the plaintiff which arose out of the same transaction . . . ."). Second, Defendants' recoupment defense is barred by the release. Third, Defendants' did not establish recoupment or setoff by a preponderance of the evidence.

DEFENDANTS' STANDING DEFENSE

260. Plaintiffs have standing to assert these claims. First, the Liquidating Plan authorizes Plaintiffs to pursue these claims. Second, the Oversight Committee is a representative of the EyeCorp estate because its activities benefit the EyeCorp estate. *See TGX Corp. v. J.C. Templeton (In re TGX Corp.)*, 168 B.R. 122, 131 (W.D. La. 1994) ("So long as the plan properly retained these claims in the debtor's estate, recovery would vest in the estate, and absent provision in the plan, would remain subject to the claims and interests of the debtor's pre-petition creditors and *equity security holders.*") (emphasis added). Third, Section 550(a) expressly contemplates recovery

for the benefit of a debtor's estate, not merely its creditors. *See Trans World Airlines, Inc. v. Travellers Int'l AG (In re Trans World Airlines, Inc.)*, 163 B.R. 964, 972 (Bankr. D. Del. 1994) ("There is no requirement that an avoidance action recovery be distributed (or 'committed) in whole or in part to creditors. Indeed the Code clearly contemplates otherwise."); *see also* 11 U.S.C. § 550(a) (1997).

DEFENDANTS' STANDING ON NOTE DEFENSE

261. Plaintiffs are not barred from recovery because the Oversight Committee has standing and capacity to sue VRF for recovery on the Note.

DEFENDANTS' 11 U.S.C. § 1123 DEFENSE

262. Plaintiffs are not barred from recovery under 11 U.S.C. § 1123(b)(3)(B) because the Oversight Committee is a representative of the EyeCorp estate and was appointed for such a purpose.

RELIEF

263. Based on these findings and conclusions, the Court orders the following relief:

- The avoidance of the transfer of 825 Ridge Lake Boulevard or damages related to such transfer — $4,359,745;
- Damages to PRG related to LOI expenses — $ 96,172.

264. The Oversight Committee has also established its entitlement to recover on the Note and Guaranty in the amount of $1,657,000, which includes interest through January 31, 2003.

ATTORNEYS' FEES

265. The Court find that Plaintiffs are entitled to reasonable attorneys' fees and

expenses. Plaintiffs should submit an application setting forth the time and expenses related to the matters for which judgment in favor of Plaintiffs has been entered, Plaintiffs shall obtain a hearing date and time from the Court's Courtroom Deputy, and Plaintiffs shall provide appropriate notice of the hearing. Defendants may respond in writing no later that five calendar days prior to such hearing.

266. Any finding of fact may also be deemed a conclusion of law.

SIGNED: 3/13/03

The Honorable Harlin D. Hale
United States Bankruptcy Judge